IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 119

WILLIAM J. MURRAY III, INFANT, BY MADALYN E. MURRAY, HIS MOTHER AND NEXT FRIEND, AND MADALYN E. MURRAY, INDIVIDUALLY,

Petitioners,

VS.

JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS. M. RICHMOND FARRING, ELI FRANK, JR., DR. ROGER HOWELL, HENRY P. IRR, DR. WILLIAM D. McELROY, MRS. ELIZABETH MURPHY PHILLIPS, JOHN R. SHERWOOD, INDIVIDUALLY, AND CONSTITUTING THE BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above-entitled cause on April 6, 1962, affirming the judgment of the Superior Court of Baltimore City entered April 27, 1961 in favor of the defendants for costs of suit (Appellants' Appendix below, p. E. 1).

CITATIONS TO OPINIONS BELOW

The opinion of the Superior Court of Baltimore City, the court of first impression, is reported in the Daily Record (Baltimore), issue of June 12, 1961, and is set forth in the Appellants' Appendix below, pp. E. 6-E. 17.

The opinion of the Court of Appeals of Maryland is reported at Md. , A. 2d , the dissenting opinion at Md. , A. 2d , and these opinions are set forth in the Appendix, *infra*, starting at pages 1a and 11a, respectively.

JURISDICTION

The final judgment of the Court of Appeals of Maryland, the court of last resort of that State, filed April 6, 1962, was entered on that same date (clerk's certificate attached hereto, *infra*, App. 22a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 (3), there having been drawn in question below, and the petitioners claiming here the matter of the validity of a statute of the State of Maryland upon the ground of its being repugnant to the First and Fourteenth Amendments to the Constitution of the United States, and the petitioners having asserted below and claiming here, denial of rights, privileges, and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States. The highest court of the State of Maryland, in its decision, ruled upon these said matters of validity, and of rights, privileges, and immunities, unfavorably to the petitioners.

QUESTIONS PRESENTED

1. Do the opening exercises for public schools provided for by, and instituted under, Section 6 of Article II of the Rules of the Board of School Commissioners of Baltimore

City, promulgated under a state statute giving the Board general supervisory powers over schools violate any constitutional right of the petitioners which is guaranteed by the "establishment" and "free exercise" clauses of the First Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment, or of the "equal protection" clause of the Fourteenth Amendment?

2. Has the Rule above mentioned and the practice instituted under it in the public schools of Baltimore City by the Board of School Commissioners deprived the petitioners of rights, privileges or immunities guaranteed by the "establishment" and "free exercise" clauses of the First Amendment to the Constitution as made applicable to the States by the Fourteenth Amendment?

3. Is the decision below in conflict with the decisions of this Court concerning the free exercise of religion, the passage of laws respecting an establishment of religion, and concerning the separation of Church and State?

CONSTITUTIONAL PROVISIONS, STATUTES, AND ADMINISTRATIVE REGULATIONS INVOLVED

This case involves the following:

1. A portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. A portion of the First Amendment to the Constitution of the United States,

> "(Congress) shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

3. A part of Article 77, Section 203 of the Annotated Code of Maryland (Michie, 1957) (Referred to in Memorandum Opinion of the Superior Court of Baltimore City, Appellants' Appendix below, E. 7).

> "The Board of Commissioners of public schools of Baltimore City, or by whatever name the body may be known that has supervisory power and control over the public schools of Baltimore City . . ." (shall have certain powers and duties).

Also Section 202 of Article 77, which is by necessary inference a part of Section 203,

> "The mayor and city council of Baltimore shall have full power and authority to establish in said city a system of free public schools which shall include a school or schools for manual or industrial training, under such ordinances, rules and regulations as they may deem fit and proper to enact and prescribe; they may delegate supervisory powers and control to a Board of School Commissioners; . . ."

And also Section 91 of the Charter and Public Local Laws of Baltimore City (Flack, 1949), drawn in by inference by Sec. 202, *supra*,

> "Education, Department of, General Powers and Duties. (a.) There shall be a Department of Education, the head of which shall be a Board of School Commissioners . . ."

4. Article VI, Section 6, of the Rules of the Board of School Commissioners of Baltimore City,

> "Opening Exercise. Each school, either collectively or in classes, shall be opened by the reading, without

comment, of a chapter in the Holy Bible and or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it . . ." (Appellants' Appendix below, E. 2).

Also, an amendment to the above Rule, adopted November 17, 1960 by the Board, providing that,

"Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian." (Appellants' Appendix below, E. 3).

5. The compulsory school attendance law of the State of Maryland as contained in Article 77 of the Annotated Code of Maryland (Michie, 1957):

"Sec. 231 (a) *Who must attend.* Every child residing in Baltimore City and in any county in the state between seven and sixteen years of age shall attend some day school regularly as defined in Sec. 233 of this article. . . . Every person having under his control a child between seven and sixteen years of age shall cause such child to attend school or receive instruction as required by this section. . . .

"(b) *Penalty.* Any person who has a child under his control and who fails to comply with any of the provisions of this section shall be deemed guilty of a misdemeanor, and be fined not exceeding five dollars for each offense."

STATEMENT OF THE CASE

The case was heard below without testimony upon the pleadings. Extracting the facts from the pleadings (Appellants' Appendix below, pp. E. 1-E. 6), they are as follows.

Both the infant petitioner and the individual petitioner, his mother, are atheists. The infant petitioner attends the public schools of Baltimore City. The defendant School

Board is by statute charged with supervision and control of the Baltimore City public schools. Under its rule making authority the defendant Board established a rule many years ago making the conduct of a short sectarian religious ceremony mandatory at the opening of each day of school. This ceremony consists of the reading, without comment, of one chapter of the Bible "and or" recitation of the Lord's Prayer. The petitioners, who are subject to the compulsory school attendance law of the State of Maryland, before filing their action below, had requested the Board to rescind its rule and to direct that the practice of holding this daily religious ceremony be discontinued by the teachers under its control. The practice was not stopped, nor the rule changed. However, the Board did amend the rule so as to allow any pupil to be excused from attendance at the exercises upon presenting the written request of his parent or guardian. This the infant petitioner did, but thereafter, he suffered "loss of caste with his fellows, (was) regarded with aversion, and . . . subjected to reproach and insult", and was subjected to certain other substantial disadvantageous effects which followed from his exclusion from the classroom religious ceremony. Therefore, upon the religious practice being continued as before (though without the infant petitioner's presence in the classroom), the action was brought below.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED

The action consisted of a Petition for the Issuance of the Writ of Mandamus commanding the defendants to "rescind and cancel the Rule in question and to cause the teachers in Baltimore City to discontinue the "practice and exercises" set forth.

The petition (Appellants' Appendix below, pp. E. 1-E. 5) alleged the state citizenship and residence of the petitioners, the status of the adult petitioner as a taxpayer and of the infant petitioner as a student; that both were subject to the compulsory school attendance statute of the state; the supervisory power of the defendants over the public schools in question; the existence of the Rule as to the sectarian religious exercises, and its enforcement by the defendants to the detriment of the petitioners; the contravention of the rights of the petitioners to freedom of religion under the First and Fourteenth Amendments and the violation of the principle of separation of Church and State; the violation of the constitutional rights of the petitioners by threatening their religious liberty; the averment that the provision for being excused in no wise negated nor mitigated the violation and infringement of the petitioners' constitutional rights, and the averment of the ill effects which the infant petitioner experienced as a result of his forced choice to be excluded from the exercises; the deprivation of equality under the laws; and the request to, and the refusal of, the defendants that they cease from the religious practice protested against.

The defendants demurred to the petition on the ground that mandamus was not the proper form of action, and that the petition stated no grounds for relief. Thereby, in law, the defendants admitted the truth of all well-pleaded facts alleged in the petition. (See dissenting opinion, App. 13a *infra*).

The demurrer was sustained without leave to amend, the petition dismissed and judgment absolute for costs entered against the petitioners (Appellants' Appendix below, pp. E. 1, E. 17).

In sustaining the demurrer, the lower court ruled that mandamus was an appropriate form for the action if the

action of the Board was illegal (unconstitutional) (Appellant's Appendix below, E. 8), and then proceeded to make its ruling, purely on federal constitutional grounds. See particularly E. 10-E. 13, and E. 16-E. 17, Appellants' Appendix below, wherein the opinion of the lower court is set forth.

The lower court in addition to quoting this court in *Everson*, *McCollum* and *Zorach*, also quoted from the cases of *Engel v. Vitale*, 191 N.Y.S. 2d 453 and *Schempp v. School District*, 177 F. Supp. 398 (E.D. Pa. 1959) on federal grounds (Appellants' Appendix below, E. 15) in both of which cases further proceedings now are pending or contemplated in this court on subsequent evolvements. (*Engel v. Vitale*, No. 468, 1961-62 Docket).

In the Court of Appeals of Maryland, wherein the lower court's decision sustaining the demurrer was upheld, both the majority (4 members of the court) and the minority (3 members of the court) based its decision on federal grounds.

It was agreed by the entire court that mandamus was a proper form of action. ("(T) here is no reason why the question may not be determined on a petition for writ of mandamus under such circumstances as are present in this case . . ." (App. 4a, *infra*.) See also the dissenting opinion (App. 13a).

The majority of the Court of Appeals of Maryland "assumed" that the petitioners had standing to sue (App. 5a), and found that the Rule and the practice complained of were constitutional.

The minority opinion stated that the majority had "assume(d) without deciding" the question of standing (App. 13a). (Had it? The petitioners here contend that it did

decide affirmatively the question of "standing".) The minority of the court decided unequivocally, and as a matter of law, that by the holdings in *Everson v. Board*, 330 U.S. 1, *Baker v. Carr*, U.S. , and particularly *McCollum v. Board*, 333 U.S. 203, *Zorach v. Clauson*, 343 U.S. 306, 309 n. 4 and other cases (App., 13a-14a) there was no question but that the interest of the petitioners was "clearly sufficient".

Both majority and minority then went on to base its decision completely on federal constitutional grounds.

In the majority opinion the court stated:

> "The essential question thus presented is whether the daily Bible reading and Prayer recitation program, at which attendance is not compulsory, is a violation of the 'establishment of religion' and 'free exercise' clauses of the First Amendment (as applied to the States through the due process clause of the Fourteenth) or of the 'equal protection' clause of the Fourteenth Amendment. We think that neither constitutional provision is violated, for, as we see it, neither the First nor the Fourteenth Amendment was intended to stifle all rapport between religion and government." . . . (App., 5a).

The court then quoted from *Zorach v. Clauson*, 343 U.S. 306 (App., 7a-8a), *Everson v. Board of Education*, 330 U.S. 1 (App., 6a), *McCollum v. Board of Education*, 333 U.S. 203 (App., 6a), *School District v. Schempp*, 364 U.S. 298 (App., 8a), *Torcaso v. Watkins*, 367 U.S. 488 (App., 9a), *McGowan v. Maryland*, 366 U.S. 420 (App., 9a) and *Brown v. Board of Education*, 347 U.S. 483 (App., 11a), all as federal constitutional bases for its affirmance of judgment.

Finally, the majority held (App., 11a), that,

> "Inasmuch as the Supreme Court has not yet spoken with respect to the Bible reading and Prayer recitation

ceremonies at school opening exercises, we think we are bound by what we understand is the effect of *McCollum* as it is explained and expanded in *Zorach* until such time as the Court speaks further in this uncertain area. So, having decided that the school opening exercises in Baltimore City are not violative of either the First or Fourteenth Amendments, we hold that the demurrer as to both appellants was properly sustained.

For the several reasons stated herein, the judgment will be affirmed.

Judgment affirmed; Appellants to pay the costs." . . .

Likewise the minority finding was almost entirely based on federal constitutional grounds.

It too relied on *Everson* (App., 14a-15a), *McCollum* (App., 15a-16a), *Torcaso v. Watkins* (App. 16a, 18a, 21a, 22a), *Zorach* (App., 17a-18a), *McGowan v. Maryland* (App., 18a, 19a) and *Brown v. Board of Education* (App., 21a), as well as *Talley v. California*, 362 U.S. 60 (App., 21a), but reached, of course, a conclusion opposite to that of the majority, and held, on federal constitutional grounds, the writer of the opinion, Judge Brune, speaking for the entire minority, that:

> "I can only state my understanding of the effect of prior decisions of the Supreme Court and express my own opinion that those decisions call for a decision of this case reaching a result opposite to that reached by a majority of this Court" . . . (App., 22a).

REASONS FOR GRANTING THE WRIT

This is a case in which, after hearing oral argument, and then reargument, the majority of the Maryland Court of Appeals, in a four to three decision, held that "the Supreme Court has not yet spoken" (App., *infra*, 11a), and in which the minority stated ". . . (W)e can only state . . . that . . .

(prior decisions of the Supreme Court) call for a decision of this case reaching a result opposite to that reached by a majority of this Court." (App., *infra*, 22a.) Thus, the case involves federal questions of substance which, the majority of the Maryland court stated had not theretofore been determined by this court, and which the minority found had been decided by the majority in a way probably not in accord with applicable decisions of this court. All of which will, it is hoped, be persuasive as to the granting of the writ of certiorari prayed, under Supreme Court Rule 19, Sec. 1(a).

Clearly, it is felt, the case involves substantial matters upon constitutional questions, and particularly concerning the "establishment" and "free exercise" clauses of the First Amendment. Of course, the petitioners contend, along with the minority of the Maryland court, that the question was resolved by the court below in a manner in conflict with principles heretofore expressed by this court, but at the same time, it is apparent that the particular point in question, the constitutionality of the recital, in public school classrooms, of a prayer and a reading from Holy Scripture, which is acceptable to certain religious sects (albeit the majority sects), but not acceptable to others, has never specifically come before this court.

McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 249 and *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 554 each had to do with religious instruction which was aided by the public schools. In the former case it was held that released time religious instruction offered upon school premises during school hours amounted to an operation of the state's compulsory education system to assist a program of religious instruction carried on by separate religious sects, and was within

the ban of the First Amendment made applicable to the states by the Fourteenth; that the "establishment" clause was violated in that the State was "afford(ing) sectarian groups invaluable aid . . . (by) help(ing) to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State." (Mr. Justice Black delivering the opinion of the Court.)

In the *Zorach* case, the students were released for religious instruction, again, during the school day, but to attend classes *off* of school premises. In that circumstance it was held that the First Amendment was not violated since there was no "concert or union or dependency" of Church and State, but that there was merely an "accommoda(tion of) schedules to a program of outside religious instruction" which did not fall within First Amendment prohibitions.

In the same vein, was *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711. There it was decided that the First Amendment is not violated by a state statute providing public tax-supported bus transportation to both public and parochial schools, since the legislation in question, as applied, did no more than "provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools. . . .", while at the same time it was held that "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. (The state) has not breached it here." (Opinion of the court delivered by Mr. Justice Black.)

Also, the decision below, seems to conflict with that in the second flag salute case, *Board of Education v. Barnette*,

319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, in which it was held that a school board had no authority to compel a flag salute and pledge, and that,

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or require free citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."
>
> "We think the action . . . invades the sphere of the intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

The right of children to be excused from the classroom in the case of religious exercises, as in the instant case scarcely seems to even touch, much less obviate the denial of their right to have no need to "confess, by word or act their faith (in a prescribed ceremony)."

In *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, recently before this court, in which a test oath or religious qualification of the Maryland Constitution, requiring a declaration of belief in the existence of God of one holding the office of Notary Public was overthrown, the Court said,

> "(We) decided *Everson v. Board of Education*, 330 U.S. 1, and said this at pages 15 and 16:
>
> "The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs,

> for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can openly or secretly participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State".'

"While there were strong dissents in the *Everson* case, they did not challenge the Court's interpretation of the First Amendment's coverage as being too broad, but thought the Court was applying that interpretation too narrowly to the facts of that case. Not long afterward, in *Illinois ex rel. McCollom v. Board of Education*, 333 U.S. 203, we were urged to repudiate as dicta the above-quoted *Everson* interpretation of the scope of the First Amendment's coverage. We declined to do this, but instead strongly reaffirmed what had been said in *Everson* calling attention to the fact that both the majority and the minority in *Everson* had agreed on the principles declared in this part of the *Everson* opinion. And a concurring opinion in *McCollom*, written by MR. JUSTICE FRANKFURTER and joined by the other *Everson* dissenters, said this:

> 'We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an "established church." . . . We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion".'

"The Maryland Court of Appeals thought, and it is argued here, that this Court's later holding and opinion in *Zorach v. Clauson*, 343 U.S. 306, had in part repudi-

ated the statement in the *Everson* opinion quoted above and previously reaffirmed in *McCollum*. But the Court's opinion in *Zorach* specifically stated: 'We follow the *McCollum* case,' 343 U.S. at 315. Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionality discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly, profess to have a belief in some particular kind of religious concept.

"We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

"In upholding the State's religious test for public office the highest court of Maryland said:

> 'The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office.'

"The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in *Wieman v. Updegraff*, 344 U.S. 183."

More recently, but probably less directly to the point of defining the constitutionality of sectarian school prayer ceremonies than the above cases, is *McGowan v. Maryland*, 366 U.S. 42, 81 S. Ct. 1101, and the related cases of *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617;

81 S.Ct. 1122; *Two Guys from Harrison v. McGinley*, 366 U.S. 582, 81 S. Ct. 1136; and *Braunfield v. Brown*, 366 U.S. 599, 81 S. Ct. 1144. These were "Sunday Blue Law" cases, in which, however, this court once more closely examined First Amendment prohibitions, and found that Sunday closing laws were public health and welfare statutes, and not, in intrinsic intent, an incursion into the area of religious observances by the states.

However, in the discussion of the First Amendment which the opinions in these cases covered learnedly and in great detail, (the opinions comprise 127 pages in the reports), it was held once again that

> "(T)he First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws respecting an establishment of religion (Emph. the Court's.) Thus, this Court has given the Amendment a broad interpretation . . . in the light of its history and the evils it was designed forever to suppress' . . . *Everson v. Board*. . . . It has found that the First and Fourteenth Amendments afford a protection against religious establishment far more extensive than merely to forbid a national or state church. . . ."

(The Chief Justice, speaking for the Court at 366 U.S. 442.)

It might be pointed out that in *McGowan*, Mr. Chief Justice Warren, in a footnote (n. 18 at 344), quoted, with emphasis, from the dissenting opinion in *Everson*, as follows

> *"Hence today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion.*

religious establishments, or establishments having a religious foundation whatever their form or special religious function." (The Court's italics.)

It was also held, in *McGowan*, at 442:

"(I)t is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."

Thus, the allegation is put forth by the defendant School Board in the instant case, and its contention is affirmed by the Maryland Court of Appeals, that the daily prayer ceremony is a permissible "regulation of conduct" as described in *McGowan v. Maryland*, while it is the position of the petitioners that in reality, the situation is that of a state government "forc(ing) or influenc(ing) a person . . . to profess a belief or disbelief in any religion", as prohibited in *Everson* and, strongly, in *Torcaso*.

But though the issue is joined, it has, at least not specifically, ever been decided by this court, or, alternatively, it has been decided in a way with which the Maryland decision below, is not in accord.

The Maryland Court in the instant case, incidentally, said that it thought it

"significant that the Supreme Court, in *School District of Abington Township v. Schempp*, 364 U.S. 298 (1960), ordered *per curiam* that the judgment below be vacated and remanded the case to the district court for further proceedings after it was learned that the Pennsylvania law had been amended so as to provide for the excusing of those students who objected to participating in a school opening ceremony quite similar to that in Baltimore City. It seems to us that the remand of this case at least indicated that the use of coercion or the lack of it may be the controlling fac-

> tor in deciding whether or not a constitutional right has been denied. In reaching this conclusion we are not unmindful that the District Court . . . upon the remand . . . held . . . that the . . . statute is not constitutional . . ." (App., *infra*, 8a.)

So the Maryland Court has acted oppositely to the Pennsylvania District Court. The petitioners are informed that appeal of the *Schempp* case is contemplated.

The petitioners are also aware that *Engel v. Vitale*, No. 468, 1961-62 Docket (Cert. granted December 4, 1961) has heretofore been argued before this court on March 27, 1962. That case, however, is believed to present a somewhat narrower issue, in that the prayer involved[1] relates to no particular sect or establishment of religion, other than those that believe in God, while the question in this case concerns a ceremony distinctly either Christian, or Christian and Jewish in substance, and out of keeping with the religious teachings of other religious faiths.

Moreover, in stating that the use of coercion, or the lack of it, may be the deciding factor, the Maryland court overlooks the significance of *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873. The petitioners contend that the religious discrimination present in classroom reading of the Bible, and particularly that involved in excusing or dismissing one or several children from the class during such reading would be wholly as severe in its social and psychological effects as the racial discrimination which was before the court in the segregation cases, and such segregation on a religious basis is wholly prohibited by the court's decision in the segregation cases.

[1] So-called "Regents prayer". The prayer is worded as follows: "Almighty God, we acknowledge our dependence on Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX

Court of Appeals of Maryland
No. 90, September Term, 1961

William J. Murray III, infant, etc., et al.

v.

John N. Curlett et al. and Board of School Commissioners of Baltimore City

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Before Brune, C.J., Henderson, Hammond, Prescott, Horney, Marbury and Barrett, Lester L. (specially assigned), JJ.

Opinion by Horney, J.

Brune, C.J., Henderson and Prescott, JJ., dissent
Filed: April 6, 1961

This appeal presents the question of whether the daily opening exercises of the Baltimore City public schools—wherein the Holy Bible is read and the Lord's Prayer is recited — violate the constitutional rights of a student and his mother who claim they are atheists.

The judgment appealed from is one for costs entered by the lower court after it had sustained without leave to amend the demurrer of the appellees (the Board of School Commissioners of Baltimore City and the president and other individual members thereof constituting the "Board") to the petition of the appellants (William J. Murray, III, the "student," and Madalyn E. Murray, the "mother" or "parent") for a writ of mandamus. The writ was sought to compel the Board to "rescind and cancel" a rule (and a recent amendment of it) adopted by the Board in 1905, pursuant to the power and authority con-

ferred on it by the State, concerning the opening exercise program in the public schools. The rule and amendment attacked is designated as § 6 of Article VI of the Rules of the Board, and reads as follows:

> "Section 6 — Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should [also] be held as a part of the general opening exercise of the school or class. *Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon written request of his parent or guardian.*

The italicized portion of the rule was added by an amendment on November 17, 1960, in order to comply with an opinion rendered by the Attorney General (C. Ferdinand Sybert, now a member of this Court) at the request of the State Superintendent of Schools following a protest by the appellants to the effect that to require the atheistic student to attend the daily exercises was to compel him to participate in a religious training program that was offensive to him.

The petition, in addition to stating that the fourteen year old boy is a student in a public school and that the parent is a resident and taxpayer, further states that the practice under the rule had been to read from the King James version of the Bible and that the student, until the adoption of the amendment, was "required and compelled" to attend the reading program and to recite the Lord's Prayer, but that when the amendment was made he was excused at the request of his mother from further attendance.

The petitioners, in contending that the mandatory rule contravenes their freedom of religion under the first and fourteenth amendments in that it violates the principle of

separation between church and state,[1] claim that the enforcement of the rule "threatens their religious liberty" in one way or another; that the rule "subjects their freedom of conscience to the rule of the majority"; and that the rule, by equating moral and spiritual values with religious values has thereby rendered their beliefs and ideals "sinister, alien and suspect" which tends to promote "doubt and question of their morality, good citizenship and good faith."

It is further claimed that the amendment excusing the student from participating in or attending the opening program "in no wise negates or mitigates the violation and infringement of their constitutional rights"; that the exclusion of the student has caused him to lose caste, to be regarded with aversion, and to be subjected to reproach and insult; and that the practice "tends to destroy the equality of the pupils" and place him in a disadvantageous position with respect to other pupils.

In conclusion, the petitioners state that although they have requested a cessation of the practice, the use of the rule has not ceased, but has been continued, and that they are thereby harmed.

The Board demurred to the petition on the ground that it did not state a good cause of action for which relief could be granted by way of mandamus. The lower court sustained the demurrer and dismissed the petition without leave to amend. In its memorandum opinion, the court stated two reasons for the action taken. The ultimate decision was based on the theory that the Board, in requiring that the Holy Bible be read or the Lord's Prayer be recited each school day as a part of the opening exercises, with a proviso that objecting students could be excused, was acting in the exercise of discretionary power that the issuance of a writ of mandamus could not stay. But prior to

[1] The petitioners also contended that the rule was contrary to the provisions of the Code (1957), Art. 77, § 203, proscribing the selection of textbooks of "a sectarian or partisan character," but, other than stating in their brief that they objected to the conduct of religious teachings, whether sectarian or non-sectarian, in public schools, they did not pursue this contention on appeal.

that, the court had found that the facts alleged in the petition for the writ did not "spell out any violation" of the constitutional rights of the petitioners.

Arguments in this case were heard twice. The initial argument was heard by five of the seven judges of this Court on both questions presented by the appeal: (i) whether mandamus is a proper action in which to test the constitutionality of the school board rule; and (ii) whether the provisions of the regulation under attack violate a constitutional right of the petitioners. The reargument was heard by seven judges, one of whom was substituting for Judge Sybert, and in the order directing reargument, we limited the reargument to the constitutional questions raised by the petition. We were then of the opinion and we now hold that where the performance of a duty prescribed by law depends on whether the statute or regulation is constitutional or invalid, there is no reason why the question may not be determined on a petition for a writ of mandamus under such circumstances as are present in this case. *Welch v. Swasey*, 79 N.E. 745 (Mass. 1907); 38 Corpus Juris, *Mandamus*, § 681b(1); 16 C.J.S., *Constitutional Law*, § 95. See also *High's Extraordinary Legal Remedies* (3rd ed.), § 332b, p. 325, where, in citing *State v. District Board*, 76 Wis. 177 (1890), it is said that "[m]andamus will lie against a board intrusted with the management of public schools to compel them to discontinue the reading of the Bible in such schools." Moreover, there are a number of decisions in this state where the courts without challenge as to the propriety thereof have proceeded to determine a constitutional question preliminary to the grant or refusal of a writ of mandamus. See, for example, *University v. Murray*, 169 Md. 478, 182 Atl. 590 (1936); *Williams v. Zimmerman*, 172 Md. 563, 192 Atl. 353 (1937); *Torcaso v. Watkins*, 223 Md. 49, 162 A. 2d 438 (1960), *reversed* (on another ground and decided on merits), 367 U. S. 488 (1961).

The principal question is whether the demurrer was properly sustained. The appellees contend preliminarily that the petitioners have not shown they have standing to

challenge the rule and the practice under it in the schools of Baltimore City.

If the petitioners lacked standing to sue, this would require affirmance even though the rule and the practice were unconstitutional. Since we find them to be constitutional, we shall assume the petitioners had standing to sue and proceed to discuss the reasons for our views as to constitutionality.

The essential question thus presented is whether the daily Bible reading and Prayer recitation program, at which attendance is not compulsory, is a violation of the "establishment of religion" and "free exercise" clause of the First Amendment (as applied to the States through the due process clause of the Fourteenth) or of the "equal protection" clause of the Fourteenth Amendment. We think that neither constitutional provision is violated, for, as we see it, neither the First nor the Fourteenth Amendment was intended to stifle all rapport between religion and government.

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."

Thus spoke Justice Douglas (at p. 313) in the majority opinion in *Zorach v. Clauson*, 343 U.S. 306 (1952).

The Supreme Court of the United States has not yet passed on either of the constitutional questions posed by this appeal. Yet, there are several decisions concerning the separation of Church and State which we think point the way and clearly indicate that a public school opening exercise such as this one — where the time and money spent on it is inconsequential — does not violate the religious clauses of the First Amendment or the equal protection clause of the Fourteenth Amendment, as would the teaching of a sectarian religion in a public school on school time and at public expense.

The first of the cases we have in mind is *Everson v. Board of Education*, 330 U.S. 1 (1947), where the Court, though it recognized that the clause against the establishment of religion was intended to erect "'a wall of separation between church and state,'" held that the reimbursement of parents for the cost of transporting their children to parochial and public schools by bus did not violate the "establishment of religion" clause of the First Amendment because the purpose of the New Jersey statute was to provide safe transportation in the general public welfare.

In *McCollum v. Board of Education*, 333 U.S. 203 (1948), however, where the Illinois public schools and the machinery for compelling attendance thereat were used by sectarian teachers to give religious instruction in such public schools to those pupils who were required to attend the religious classes at the request of their parents, while the other pupils (who were not attending the religious classes) were compelled to attend secular classes instead of being released, the Court held in no uncertain terms that such practices fell "squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth)."

And four years later in *Zorach v. Clauson*, *supra*, the Court, though following the *McCollum* case, distinguished

it nevertheless by stating that a "released time" program of a type different from that involved in *McCollum* was not unconstitutional. In New York the public schools are permitted to release students during school hours on the request of parents to go to classes off school premises for religious instruction, but those who are not so released stay on in public school classrooms. In holding that the program did not violate the First Amendment through the Fourteenth, the Court, after noting that the program did not involve religious instruction in public schools or the expenditure of public funds, nor the use of coercion to require public school students to go to religious classrooms, went on to point out (at p. 312) that if the First Amendment "in every and all respects" required a separation of Church and State, then:

> "Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"

This then may well be the key to the difficult problem with which we are confronted.

We think there is little doubt that a decision in this case lies somewhere between the decision in *McCollum* and that in *Zorach*. In the *McCollum* case, where the "tax-established and tax-supported public school system [was utilized] to aid religious groups to spread their faith," the released time program was unconstitutional. And, in the *Zorach* case, where the public schools did no more than "accommodate their schedules to a program of outside religious instruction," the program was constitutional. It is to be noted, however, that both pro-

grams were conducted during school hours, though one involved the use of state funds and the other was at the expense of the churches. But, here, where the use of school time and the expenditure of public funds is negligible, we think the daily opening exercises of the schools in Baltimore City are in the same category as the opening prayer ceremonies in the Legislature of this State and in the Congress of the United States, in the public meetings and conventions which are opened with prayers or supplications to God, and in the formal call of court sessions by the crier in State and Federal courts. For these reasons, and particularity because the appellant-student in this case was not compelled to participate in or attend the program he claims is offensive to him, we hold that the opening exercises do not violate the religious clauses of the First Amendment.

With regard to the effect of having been excused from attending the opening exercises, we think it is significant that the Supreme Court, in *School District of Abington Township v. Schempp*, 364 U.S. 298 (1960), ordered *per curiam* that the judgment below be vacated and remanded the case to the district court for further proceedings, after it was learned that the Pennsylvania law had been so amended as to provide for the excusing of those students who objected to participating in a school opening ceremony quite similar to that in Baltimore City. It seems to us that the remand of this case at least indicated that the use of coercion or the lack of it may be the controlling factor in deciding whether or not a constitutional right has been denied. In reaching this conclusion we are not unmindful that the District Court for the Eastern District of Pennsylvania has, upon the remand, reheard the case, and again held (in an opinion by John Biggs, Jr., Circuit Judge, reported in F. Supp. 2d (1962)) that the Pennsylvania statute is not constitutional, despite the fact that objecting students could have been excused on the request of their parents, but we do not find the decision on remand persuasive and decline to follow it. Moreover, we think it is clear that the case at bar is not

governed by the *McCollum* case on the question of compulsory participation, even though *McCollum* was "followed" in *Zorach* as well as in *Torcaso* on the "separation of church and state" point. In *McCollum*, there was a degree of compulsion, but in this case, as in *Zorach*, *all* compulsion has been removed so far as attendance of the appellant-student at the opening exercises is concerned.

Furthermore, we are not convinced that *Torcaso v. Watkins* (367 U.S. 488) has any bearing on our problem. True, it is a case involving the separation of church and state, but we think it is clearly distinguishable from the instant case. There, in holding that "neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion,'" the Court went on to say (at p. 495) that the fact "that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by a state-imposed criteria forbidden by the Constitution." In that case the Court was concerned with the compulsion which required a non-believer to profess a belief in God in order to qualify for public office. The present case, however, as has been pointed out, is completely devoid of any compulsion or coercion to attend the school opening exercises. Nor do we find any sustenance for the appellant-student in the Sunday Blue Law cases, including *McGowan v. Maryland*, 366 U.S. 420 (1961), which was cited at the reargument.

The Bible reading and Prayer recitation programs in the public schools of other states, at which attendance was not compulsory, have been held to be valid by the appellate courts of such states. In an early case, *Church v. Bullock*, 109 S.W. 115 (Tex. 1908), the Court, in upholding a resolution stipulating that students should be present at, but were not required to participate in, the public school exercises in which the Bible was read and the Lord's Prayer was recited, held that the program did not contravene the constitutional provision against the use of public funds to support sectarian religion. In the case of *People ex rel Vollmar v. Stanley*, 225 Pac. 610 (Colo. 1927), the Court,

although stating that children could not be required against the will of their parents to attend the reading of the Bible in public schools, nevertheless held that the Bible reading ceremony could not be prohibited altogether. In a comparatively recent case, *Doremus v. Board of Education*, 75 A. 2d 880 (N.J. 1950), *appeal dismissed* 342 U.S. 429 (1952), the Supreme Court of New Jersey, in observing that the First Amendment did not prohibit the recognition of God, held that the noncompulsory practice of reading the Bible and reciting the Lord's Prayer, in conformity with the applicable statute, did not constitute the establishment of religion or prohibit the free exercise thereof. And the recent case of *Engel v. Vitale*, 10 N.Y. 2d 176, 218 N.Y.S. 2d 659 (1961), presently pending in the Supreme Court of the United States, the Court of Appeals of New York affirmed by a divided court a decision of the Appellate Division (206 N.Y.S. 2d 183) holding that the noncompulsory daily recitation of the "regents prayer"[2] in the public schools was not violative of either the state or federal guarantee of freedom of religion. See also *Donahoe v. Richards*, 38 Me. 379 (1854); *Moore v. Monroe*, 20 N.W. 475 (Iowa 1884); *Pfeiffer v. Board of Education*, 77 N.W. 250 (Mich. 1898); *Billiard v. Board of Education*, 76 Pac. 422 (Kan. 1904); *Hackett v. Brooksville Graded School District*, 87 S.W. 792 (Ky. 1905); *Wilkerson v. City of Rome*, 110 S.E. 895 (Ga. 1922); *Kaplan v. Independent School District*, 214 N.W. 18 (Minn. 1927); and *Lewis v. Board of Education*, 285 N.Y.S. 164 (N.Y. Misc.), *modified* 286 N.Y.S. 174 (App. Div.), *rehearing denied* 288 N.Y.S. 751 (App. Div.), *appeal dismissed* 12 N.E. 2d 172 (Ct. of Apls. 1937), for other cases that have sustained the reading of the Bible and the recitation of prayers, including the Lord's Prayer, in public schools. And see the annotation in 45 A.L.R. 2d 742.

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[2] This prayer which is recited following the pledge of allegience to the flag at the beginning of each school day is worded as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

We come now to the other constitutional question as to whether the appellant-student has been denied the equal protection of the laws guaranteed to him by the Fourteenth Amendment. He relies on *Brown v. Board of Education*, 347 U.S. 483 (1954), declaring as unconstitutional the segregation of the races in public schools, to support the theory that his self-exile from the opening exercises is having a deleterious effect on his relationship with other students in the school. The short answer to this claim is that the equality of treatment which the Fourteenth Amendment affords cannot and does not provide protection from the embarrassment, the divisiveness or the psychological discontent arising out of non-conformance with the mores of the majority. Cf. Footnote 7 to *Zorach v. Clauson, supra*, at p. 311 of 343 U.S. And see *Engel v. Vitale*, 191 N.Y.S. 2d 453 (Spec. Term 1959). We hold that the opening exercises do not violate the equal protection clause of the Fourteenth Amendment.

Inasmuch as the Supreme Court has not yet spoken with respect to the Bible reading and Prayer recitation ceremonies at school opening exercises, we think we are bound by what we understand is the effect of *McCollum* as it is explained and expanded in *Zorach* until such time as the Court speaks further in this uncertain area. So, having decided that the school opening exercises in Baltimore City are not violative of either the First or Fourteenth Amendments, we hold that the demurrer as to both appellants was properly sustained.

For several reasons stated herein, the judgment will be affirmed.

JUDGMENT AFFIRMED; APPELLANTS TO PAY THE COSTS.

BRUNE, C J., dissenting.

This suit for a writ of mandamus brought by a minor through his mother as next friend and by his mother as such and as a taxpayer seeks to bar from the public schools of the City of Baltimore "the reading, without comment, of a chapter in the Holy Bible and or the use of the Lord's

Prayer." Such reading from the Bible and or use of the Lord's Prayer are required, either collectively or in classes, as a part of the opening exercise in the public schools of Baltimore under a rule of the Board of School Commissioner of that City adopted in 1905 and amended in November, 1960 by adding this provision: "Any child shall be excused from participating in the opening exercises upon the written request of his parent or guardian." The respondents in the suit are (or were) the members of the Board of School Commissioners of Baltimore City.

The petitioners allege *inter alia*: that the minor petitioner is a student at one of the public schools of Baltimore;[1] that they are both atheists; that prior to the amendment of the above rule in 1960 the infant petitioner was required to attend the exercises prescribed by the rule and that since that amendment he has been excused from attending upon his mother's written request; that the reading of the Bible and or of the Lord's Prayer constitute a sectarian exercise in the public schools of Baltimore and so contravenes the First and Fourteenth Amendments to the Constitution of the United States; that the rule, as practiced, places a premium on belief as against non-belief, that it pronounces belief in God as the source of all moral and spiritual values, equating those values with religious values, and renders "sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith"; and that the amendment to the rule permitting pupils to be excused upon request from the opening exercises neither negates nor mitigates the infringement of their constitutional rights; that the effect of the amendment is "merely an opportunity for exclusion" of the student petitioner from a stated school exercise which a majority of the pupils have been taught to

[1] At the time the suit was filed, this petitioner was a student at one public school, but it was stipulated that at the time of the argument he was a student at another public school of Baltimore, and that his change of school does not render the case moot. Cf. *Doremus v. Board of Education*, 342 U.S. 429, 432-33, where a child's graduation did render the case moot with regard to such child.

revere, and that the exercise of that opportunity causes him "to lose caste with his fellows, to be regarded with aversion, and to be subjected to reproach and insult; and that such practice tends to destroy the equality of the pupil which the Constitution seeks to establish and protect."

The respondents demurred to the petition and their demurrer was sustained without leave to amend. Since the case comes before this Court on a ruling on demurrer, we must accept as true all well pleaded facts. *Mahoney v. Bd. of Supervisors of Elections*, 205 Md. 325, 327, 106 A. 2d 927. A difficulty here (as in many other cases) is to draw a sharp line between allegations of fact and conclusions to be drawn therefrom, and the further problem arises as to whether a conclusion should be accepted as alleged, should be tested on the basis of facts of which courts may take judicial notice, or should be determined only on the basis of proof. See, for example, the several views as to an allegation of coercion expressed in the majority opinion of Mr. Justice Douglas and in dissenting opinions of Mr. Justice Frankfurter and of Mr. Justice Jackson in *Zorach v. Clauson*, 343 U.S. 306, 311-12, 321-22, 323.

The majority and minority agree that mandamus is an appropriate remedy to enforce the rights here asserted. A question has, however, been raised as to the standing of the petitioners to maintain the suit at all. The majority assumes, without deciding, that they have sufficient standing to do so, and those who join in this dissent are of the opinion that they do possess such standing. It may be that under *Doremus v. Board of Education*, 342 U.S. 429, the adult petitioner's interest as a taxpayer would not be sufficient, though this case seems rather closer to *Everson v. Board of Education*, 330 U.S. 1 (a taxpayer's suit distinguished in *Doremus*) because of her allegations with regard to the violation of her convictions by the practice complained of. Cf. *Baker v. Carr*, U.S. (decided March 26, 1962) upholding standing of voters to sue for redress of asserted malapportionment of representation in a state legislature. See also Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, esp.

pp. 1298-99 and comment on *Everson* and *Doremus*, pp. 1310-11. In any event, the mother's interest as a parent and her son's own interest appear to be clearly sufficient under *McCollum v. Board of Education*, 333 U.S. 203, and *Zorach v. Clauson*, 343 U.S. 306, 309 (n. 4). Cf. *Board of Education v. Barnette*, 319 U.S. 624. See also *Engel v. Vitale*, 218 N.Y.S. 659, 10 N.Y. 2d 174, in which none of the several opinions in the Court of Appeals of New York found, or even referred to, any want of standing on the part of the taxpayer-parents who brought suit to prevent the recital of the so called Regents' prayer in a New York public school.

The principal contention of the appellants on the merits is that the reading from the Bible (whichever version may be used) and or the recital of the Lord's Prayer in the public schools constitute violations of the provisions of the First Amendment, made applicable to the States under the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296), which proscribe any "law respecting an establishment of religion, or prohibiting the free exercise thereof." The determination of the case depends upon the meaning and application of the Constitution of the United States. On such questions this Court accepts as binding the decisions of the Supreme Court of the United States, and this is, of course, recognized by the majority of this Court in this case as well as by those of us who dissent. The rule is stated here simply because it greatly narrows the matters pertinent to the decision of this case. It would be merely a fruitless exercise in legal history for us to present one more re-examination of the origins and meaning of the religious freedom provisions of the First Amendment, if, as we think, the decisions of the Supreme Court conclude the question to be decided. In *Everson v. Board of Education, supra*, 330 U.S. at 15-16, Mr. Justice Black, writing for the majority, said in part:

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[2] No question is raised under the Constitution of this State. See Article 36 of the Maryland Declaration of Rights. Cf. Article 37 and *Torcaso v. Watkins*, 367 U.S. 488.

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

The dissents in that case did not challenge this interpretation of the coverage of the First Amendment as being too broad, but thought it was applied too narrowly to the facts of that case.

In *McCollum v. Board of Education*, 333 U.S. 203, the Supreme Court adhered to *Everson* and held invalid under the First Amendment the Illinois "relased time" program for religious education in the public schools of Champaign. Such instructions was given on school property and on school time by representatives of several different faiths. Students who did not wish to take such instructions were excused from attendance, but were required to pursue secular studies in some other part of the school building. Students released from secular studies were required to be present at the religious classes, and reports of their presence or absence were to be made to their secular teachers. There were present in *McCollum* both the use of tax-supported property for religious purposes and close cooperation between school authorities and the local religious

council in promoting religious education. The majority opinion, written by Mr. Justice Black, stated, in part (339 U.S. at 209-10):

> "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And, it falls squarely under the ban of the First Amendment * * * as we interpreted it in *Everson v. Board of Education*, 330 U.S. 1."

Mr. Justice Frankfurter, who had dissented in *Everson*, filed an opinion in which Mr. Justice Jackson, Mr. Justice Rutledge, and Mr. Justice Burton, who had also dissented in *Everson*, joined, stating the view that the Illinois released time program there involved was invalid under the First Amendment. In it he said (333 U.S. at 213): "We are all agreed that the First and Fourteenth Amendments have secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.'" This view was recently reiterated by the Supreme Court in *Torcaso v. Watkins*, 367 U.S. 488, at 493-94, in reversing a judgment of this Court.[3] In *McCollum*, Mr. Justice Jackson filed a separate concurring opinion in which he expressed agreement with the opinion of Mr. Justice Frankfurter and also concurred in the result reached by the Court. He expressed some reservations. First, he questioned whether the facts of the case established jurisdiction in the Supreme Court; and second, he thought that the Supreme Court should place some bounds on the demands for interference with local schools which that Court is empowered or willing to entertain. Mr. Justice Reed alone dissented.

[3] The opinion was written by Mr. Justice Black and six of the other members of the Court joined in it. Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the result.

In *Doremus v. Board of Education*, 5 N.J. 435, 75 A. 2d 880, appeal dismissed, 342 U.S. 429, the New Jersey Supreme Court upheld a statute of that State providing for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day. The Supreme Court of the United States dismissed an appeal from that judgment because of the lack of standing of the appellants to maintain the suit. One appellant was a parent of a child who had graduated, and the case was held moot with respect to that child. The claims of the appellants as taxpayers were held insubstantial and insufficient. Mr. Justice Douglas, with whom Mr. Justice Reed and Mr. Justice Burton agreed, dissented as to the latter holding and thought that the case should have been decided on the merits. The majority opinion intimated doubt as to whether the allegations of the complaint showed injury to the child (who had by then graduated while she was a student, pointing out that there was "no assertion that she was injured or even offended [by the Bible reading] or that she was compelled to accept, approve or confess any dogma or creed or even to listen when the Scriptures were read" and also that there was a stipulation that any child could be excused, at his or her parents' request, from the Bible reading and that no such request had been made, 342 U.S. at 432. The Supreme Court did not, however, rest its dismissal of the appeal of the parent of this child on any ground other than mootness.

In *Zorach v. Clauson*, *supra*, the New York "released time" program for religious education for public school students was upheld. Attendance was not compulsory and the religious instruction was not given in school buildings nor was any public expense involved. Students were released on written request of their parents to leave the school premises to receive religious instruction or join in devotional exercises at religious centers, and reports of their attendance were furnished to school authorities by the religious bodies. Students not released to attend religious instruction or observances were required to re-

main in their classrooms. In the opinion of the Court in *Zorach*, Mr. Justice Douglas made the often-repeated statement relied upon by the majority of this Court in this case and by this Court in *Torcaso v. Watkins*, 223 Md. 49, 162 A. 2d 438, *reversed*, 367 U.S. 488, that "We are a religious people whose institutions presuppose a Supreme Being." 343 U.S. at 313. The Court held, over vigorous dissents by Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Jackson, that there was no violation of the principle of separation of church and state and that under the New York released time plan "the public schools do no more than accommodate their schedules to a program of outside religious instruction." The Court then added: "We follow the *McCollum* case." *Id.* at 315.

Because of the different result in *Zorach* from that in *McCollum*, there was some belief (shared by this Court in *Torcaso*) that *Zorach* marked a retraction from *McCollum*. Since the decision of *Torcaso* by the Supreme Court there can hardly be any basis for such a continued interpretation of *Zorach*. The "wall of separation" between church and state recognized by both the majority and the dissenters in *Everson*, and described as "high and impregnable" in *McCollum* (to which case the Court expressed its adherence in *Zorach*), remains as high and impregnable as ever under *Torcaso*. Cf. *McGowan v. Maryland*, 366 U.S. 420, and companion cases, *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617; Two Guys from Harrison-Allentown, Inc. *v. McGinley*, 366 U.S. 582; and *Braunfeld v. Brown*, 366 U.S. 599.

There seems to be no substantial room for dispute that the reading of passages from the Bible and the recital of the Lord's Prayer are Christian religious exercises.[4] This being so, the inclusion of such a reading or recital in the opening exercises of the public schools seems plainly to favor one religion and, to do so against other religions and against non-believers in any religion. This, I think, is directly contra to the prohibition against any "law re-

[4] If the exercises were confined to reading from the Old Testament, they would be both Jewish and Christian, but still religious

specting an establishment of religion," contained in the First Amendment, as that provision has been interpreted by the Supreme Court. See the *Everson*, *McCollum*, *Torcaso* and *McGowan* cases, all cited above. I find nothing inconsistent with the broad interpretation therein set forth in either *Doremus* or *Zorach*. I have already quoted from *Torcaso* as to the penetrating reach of the First Amendment. In *McGowan*, the Chief Justice said in the opinion of the Court (366 U.S. at 441-42): "But, the First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*. Thus, this Court has given the Amendment a 'broad interpretation * * * in the light of its history and the evils it was designed forever to suppress.'" The Court then cited *Everson*, 330 U.S. at 14-15 and cited and briefly discussed *McCollum* as holding the religious instruction program there involved "to be contrary to the 'Establishment' Clause." The religious exercises here prescribed seem to me no less so. Here we are dealing not merely with released time, but with a prescribed religious exercise conducted by public school officials in public schools of the State, attendance at which schools (with exceptions not here important) is required (Code (1957), Art. 77, Sec. 231), during school time and in school buildings. Granting that the use of school buildings is not a determinative factor in distinguishing *McCollum* and *Zorach*, I think that, if present, it is a relevant factor in determining whether the State is lending its aid to promoting religion. There is, I think, a marked difference between an accommodation of the public school schedule to religious instruction and the inclusion of religious exercises in public school ceremonies. I think that here the State is lending its aid to religion and that *McCollum* is controlling.

The fact that individual students, or theoretically all students, may be excused from attendance at these exercises does not, in my estimation, save the rule from collision with the "establishment of religion" clause of the First Amendment, even if it could save it from collision with the "free exercise of religion" clause. The coercive or com-

pulsive power of the State is exercised at least to the extent of requiring pupils to attend school and it requires affirmative action to exempt them from participation in these religious exercises.

The conclusion is in accord with the result reached by a special three-judge District Court in Pennsylvania in *Schempp v. School District of Abington Township*, F. Supp. , decided February 1, 1962. The opinion was written by Biggs, C. J., after remand of the case by the Supreme Court (364 U.S. 298) following the amendment of the Pennsylvania statute *pendente lite* so as to provide for pupils to be excused upon the written request of a parent or guardian from attending the reading, without comment, of ten verses from the Bible, such reading still being made compulsory in public schools of that Commonwealth.

I have carefully considered the case of *Engel v. Vitale*, *supra*, 10 N.Y. 2d 174, 218 N.Y.S. 2d 579, in which five of the Judges of the Court of Appeals of New York concurred in upholding the reading in a public school of that State of the so called "Regents' Prayer". There, as in the instant case and in *Schempp*, there were provisions for students to be excused from the exercises at which the prayer was required to be said. I find the dissenting opinion of Judge Dye, in which Judge Fuld concurred, more persuasive than the majority views. The majority seems to me to do as this Court did in *Torcaso* in placing too much reliance on the result of *Zorach* and the oft-quoted statement that "We are a religious people whose institutions presuppose a Supreme Being." The opinion of Justice Dye interprets the decisions of the Supreme Court substantially as I have endeavored to do in this dissent.

Despite the provisions for excuse from attending these religious exercises, two further questions relating to coercion (apart from what might be called the general coercion already considered in connection with the "establishment of religion" clause) still remain. One is whether or not there is coercion upon the individual student by rea-

son of his incurring suspicions and losing caste with his fellows, as alleged in the petition. The other is whether or not there is compulsion upon the student or his parent requesting that he be excused, or upon both, to profess disbelief in any religion.

As to the first of these questions it seems to me that under our ordinary rules of pleading, the allegations of the petition are not so insubstantial as to be brushed aside as mere conclusions of the pleader, and that they are sufficient on demurrer. The Supreme Court has recognized in *Brown v. Board of Education*, 347 U.S. 483, in applying the Fourteenth Amendment, that psychological effects upon children may be of vital importance. Such factors are alleged here, and as the case now stands they are admitted by the demurrer.

With regard to the second question stated — requiring a profession of disbelief — the situation here seems to be the converse of *Torcaso*. There the Supreme Court struck down the provision of the Constitution of this State requiring as a condition of holding an office of public trust that the person elected or appointed thereto declare his belief in the existence of God. Here, since attendance at these religious exercises is compulsory, unless a written parental excuse is filed, what amounts to a profession of disbelief in the religion to which they pertain is required of the parent and perhaps also of the child, at the peril of the child being subjected to the pressures alleged or of the parent and the child, too, if he is old enough to comprehend and share his parents' views respecting religion, subordinating or abandoning their convictions. Cf. *Talley v. California*, 362 U.S. 60, involving a freedom of speech question. Neither a profession of belief nor of disbelief may be required.

These considerations illustrate the intermeshing of the "establishment of religion" and of the "free exercise" clauses of the First Amendment. Hesitancy to expose a child to the suspicions of his fellows and to losing caste with them, will tend to cause the surrender of his and his parents' religious or nonreligious convictions and will

thus tend to put the hand of the State into the scales on the side of a particular religion which is supported by the prescribed exercises. *Torcaso* quoted from *Everson* with regard to the meaning of the establishment clause; it also explicitly held that the provision which was there condemned "invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." Whether *Torcaso* proceeds on one or the other or both of the religious freedom provisions of the First Amendment, it seems clear under all of the cases, including *Zorach*, that coercion is barred.

Engel v. Vitale, supra, cert. granted 368 U.S. 924, was argued on April 3, 1962, and is now awaiting determination by the Supreme Court. I believe that its decision in that case will be determinative of this. Meanwhile, I can only state my understanding of the effect of prior decisions of the Supreme Court and express my own opinion that those decisions call for a decision of this case reaching a result opposite to that reached by a majority of this Court.

Judge Henderson and Judge Prescott have authorized me to say that they join in this dissent.

JUDGMENT APPEALED FROM

Court of Appeals of Maryland

No. 90, September Term, 1961

William J. Murray, III, infant, etc., et al.

v.

John N. Curlett, et al and Board of School Commissioners of Baltimore City.

April 6, 1962—Judgment affirmed; appellants to pay the costs. Op. Horney, J. Brune, C. J. dissents and files dissenting opinion, in which Henderson and Prescott, J.J. concur.

STATE OF MARYLAND, Set:

I, J. LLOYD YOUNG, Clerk of the Court of Appeals of Maryland, the highest Court of said State with final jurisdiction on appeals from the trial courts therein, do hereby certify that the foregoing are full and true copies of the documents, originals of which are on file in the office of said Clerk, in the appeal of *William J. Murray, III, Infant, etc., et al v. John N. Carlett et al and Board of School Commissioners of Baltimore City*, No. 90 — September Term, 1961:

1. Appellants' Appendix, filed in this office on August 5, 1961.
2. Appellees' Appendix, filed in this office on September 25, 1961.
3. Majority Opinion of the Court of Appeals, filed on April 6, 1962.
4. Dissenting Opinion filed on April 6, 1962.
5. Docket Entries therein of the Court of Appeals.

IN TESTIMONY WHEREOF, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals of Maryland this twenty-sixth day of April, 1962.

(Seal)

J. LLOYD YOUNG,

Clerk, Court of Appeals of Maryland